

EXHIBIT D

From: [Hussain, Murad S.](#)
To: ["Popp, Dawn \(HHS/OGC\)"](#); [Oren, Emily \(HHS/OGC\)](#); [Sands, Sandra J \(OIG/OCIG\)](#); [Campbell, Yolonda Y \(CIV\)](#)
Cc: [Lollar, Tirzah](#); [Gerstner, Alyssa](#); [zzz.External.lgodesky@omm.com](#)
Subject: RE: Follow up re: CMS response to Touhy request
Date: Monday, June 13, 2022 11:04:36 PM

Counsel,

Thank you for your update this morning on the status of HHS's production in response to Defendants' subpoena. We wanted to memorialize key points from our discussion:

- You expect to produce some documents on June 15's response deadline, but these documents will not include everything responsive to the subpoena, and HHS will need to produce documents on a rolling basis.
- You explained that there may be responsive documents that are publicly available on government websites, but which you might not produce on burden grounds. Although we reserve all rights to challenge such non-production, you expressed openness to discussing a potential certification of authenticity for such online documents.
- You indicated that HHS is working on a list of custodians; that you would discuss internally whether to share that list with us when it is complete; and that for some potential custodians who are no longer with the agency, you might no longer have access to their email inboxes.
- You noted that you may withhold some responsive documents on the grounds of attorney-client privilege, deliberative process privilege, or work product protection. We reserve our rights to challenge all withholdings, but based on your description during today's call, we're particularly concerned that we'll have a disagreement about your withholdings on the grounds of deliberative process privilege. Would you agree to log documents that you are withholding on the grounds of the privilege? Even if the deliberative process privilege were applicable to a given document, it can be overcome by a sufficient showing of need. *E.g., Harding v. Cnty. of Dallas, Texas*, 2016 WL 7426127, at *12-*13 (N.D. Tex. Dec. 23, 2016) (observing that "courts have held that the deliberative process privilege is qualified and can be overcome by a sufficient showing of need," and granting plaintiffs' motion to compel production as to certain documents "despite the[ir] privileged nature" (quotation marks omitted)).

Regards,

Murad

Murad Hussain

Partner

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From: Popp, Dawn (HHS/OGC) <Dawn.Popp@hhs.gov>

Sent: Friday, June 10, 2022 8:23 PM

To: Hussain, Murad S. <Murad.Hussain@arnoldporter.com>; Campbell, Yolonda Y (CIV)

<Yolonda.Y.Campbell@usdoj.gov>

Cc: Lollar, Tirzah <Tirzah.Lollar@arnoldporter.com>; Gerstner, Alyssa

<Alyssa.Gerstner@arnoldporter.com>; zzz.External.lgodesky@omm.com <lgodesky@omm.com>;

Oren, Emily (HHS.OGC) <Emily.Oren@hhs.gov>; Sands, Sandra J (OIG/OCIG)

<Sandra.Sands@oig.hhs.gov>

Subject: RE: Follow up re: CMS response to Touhy request

External E-mail

Murad,

I apologize for responding so late. It looks like Monday at 10am should work for us. Do you mind sending out an appointment? In addition to me and Yolonda, it should also include my colleague, Emily Oren, and Sandra Sands from OIG, both of whom are cc'd here.

Thanks, and have a nice weekend.

Dawn

From: Hussain, Murad S. <Murad.Hussain@arnoldporter.com>

Sent: Friday, June 10, 2022 4:16 PM

To: Popp, Dawn (HHS/OGC) <Dawn.Popp@hhs.gov>; Campbell, Yolonda Y (CIV)

<Yolonda.Y.Campbell@usdoj.gov>

Cc: Lollar, Tirzah <Tirzah.Lollar@arnoldporter.com>; Gerstner, Alyssa

<Alyssa.Gerstner@arnoldporter.com>; lgodesky@omm.com; Oren, Emily (HHS.OGC)

<Emily.Oren@hhs.gov>

Subject: RE: Follow up re: CMS response to Touhy request

Dawn,

Thank you for your email. Would the following windows work: Monday 10am-11am, Tuesday 11am-11:30am, or 1:30pm-5pm?

Regards,

Murad

Murad Hussain

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Murad.Hussain@arnoldporter.com | www.arnoldporter.com

From: Popp, Dawn (HHS/OGC) <Dawn.Popp@hhs.gov>
Sent: Friday, June 10, 2022 3:57 PM
To: Hussain, Murad S. <Murad.Hussain@arnoldporter.com>; Campbell, Yolonda Y (CIV) <Yolonda.Y.Campbell@usdoj.gov>
Cc: Lollar, Tirzah <Tirzah.Lollar@arnoldporter.com>; Gerstner, Alyssa <Alyssa.Gerstner@arnoldporter.com>; zzz.External.Igodesky@omm.com <lgodesky@omm.com>; Oren, Emily (HHS.OGC) <Emily.Oren@hhs.gov>
Subject: RE: Follow up re: CMS response to Touhy request

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Murad et al.,
I am still working with CMS to get a full picture of the type and volume of responsive documents they have, and to collect the ones they have already identified, but I thought it might be helpful to convene another call on Monday, if possible, to discuss where we are at this point and a few additional questions/issues that have arisen. Can you let me know if there are any times on Monday (or Tuesday, if necessary) that would work for you and your team?

Thanks,
Dawn

From: Hussain, Murad S. <Murad.Hussain@arnoldporter.com>
Sent: Friday, June 3, 2022 3:32 PM
To: Popp, Dawn (HHS/OGC) <Dawn.Popp@hhs.gov>; Campbell, Yolonda Y (CIV) <Yolonda.Y.Campbell@usdoj.gov>
Cc: Lollar, Tirzah <Tirzah.Lollar@arnoldporter.com>; Gerstner, Alyssa <Alyssa.Gerstner@arnoldporter.com>; lgodesky@omm.com
Subject: RE: Follow up re: CMS response to Touhy request

Dawn and Yolonda,

Thank you for making the time yesterday afternoon for our telephonic meet-and-confer on our subpoena to HHS. During our call, Yolonda noted that DOJ does not presently intend to join a defense motion to extend the Court's discovery schedule. However, Yolonda said she would discuss this with her colleagues and let us know if DOJ has changed its position. Because of the short period allowed for discovery in our case, we cannot extend HHS's June 15, 2022 deadline for responding to our subpoena. Do you currently anticipate producing any responsive documents by June 15?

To confirm the substance of our discussion yesterday:

- Dawn indicated that she was responding only on behalf of CMS, and not other HHS divisions,

but that we should expect to hear from OIG soon.

- We expressed our concerns about HHS timely responding to our subpoena, in light of the short discovery period in our case. We understand that this case is complex, but Defendants are entitled to the requested discovery, given Relator's allegations that they supposedly submitted false/fraudulent claims and avoided supposed obligations to repay potentially millions of dollars in Medicaid funds. CMS is the putative federal "victim" of any allegedly inaccurate Medicaid claims, and DOJ presumably consulted with CMS during its statutorily mandated investigation of Relator's allegations. As we discussed on the call, Defendants are entitled to know whether CMS has concluded or contends that any of the claims submitted by our clients were false or fraudulent, that any record or statement made by Defendants was material to a false or fraudulent claim, or that Defendants have an obligation to repay any claims.
- We understand that Dawn will assess which offices and other units within CMS may have responsive documents and potentially relevant custodians, and that some searches for non-custodial documents may require first identifying the custodians. We will plan for a call next week after you have identified potential custodians. However, given the June 15 deadline for production, we assume that your document review and collection continues apace.
- We stated that rolling productions are acceptable, but we still seek responsive documents to all of our requests by the June 15 deadline.
- We are willing to receive prioritized productions, leading with the following requests: RFPs 13-16, RFPs 17-20 (*i.e.*, our requests for the claims you contend are false/fraudulent and for the payments that you contend are overpayments), RFPs 6 and 11 (prioritized as to external communications/policy documents, including rulemaking records), and RFPs 1-4 (prioritized as to external communications with Texas Medicaid and Louisiana Medicaid).
- To confirm, in response to Dawn's question: RFP 15 seeks all documents related to your understanding of the relationship between affiliated companies in the context of whether and how an affiliate's disqualification or unqualified status might affect the status of the other affiliates. We do not want all documents related to your understanding of the relationships, generally, between affiliated companies.
- Subject to further review and revision in light of documents to be produced to us, we intend to notice depositions for Secretary Xavier Becerra and some combination of Vikki Wachino, Bill Brooks, Janice L. Hoffman, Bridgette Kaiser, and Jeremy Kreisberg, as well as a Rule 30(b)(6) organizational witness. For planning purposes, please note that because we are working under a compressed litigation schedule with expert disclosure deadlines in early August and a September discovery cutoff, we will need to complete these depositions within the next 60 days.

Regards,

Murad

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From: Popp, Dawn (HHS/OGC) <Dawn.Popp@hhs.gov>

Sent: Wednesday, June 1, 2022 4:16 PM

To: Hussain, Murad S. <Murad.Hussain@arnoldporter.com>; Lollar, Tirzah <Tirzah.Lollar@arnoldporter.com>; Gerstner, Alyssa <Alyssa.Gerstner@arnoldporter.com>

Cc: Campbell, Yolonda Y (CIV) <Yolonda.Y.Campbell@usdoj.gov>

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Yes, thanks – tomorrow at 1:30 sounds good to me.

I look forward to speaking with you then.

Thanks,
Dawn

From: Hussain, Murad S. <Murad.Hussain@arnoldporter.com>

Sent: Wednesday, June 1, 2022 4:15 PM

To: Popp, Dawn (HHS/OGC) <Dawn.Popp@hhs.gov>; Lollar, Tirzah <Tirzah.Lollar@arnoldporter.com>; Gerstner, Alyssa <Alyssa.Gerstner@arnoldporter.com>

Cc: Campbell, Yolonda Y (CIV) <Yolonda.Y.Campbell@usdoj.gov>

Subject: RE: Follow up re: CMS response to Touhy request

Dawn,

Thank you for your email. We can speak at 1:30pm tomorrow. If that works, we'll circulate a dial-in number.

Regards,

Murad

Murad Hussain

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From: Popp, Dawn (HHS/OGC) <Dawn.Popp@hhs.gov>
Sent: Wednesday, June 1, 2022 1:10 PM
To: Lollar, Tirzah <Tirzah.Lollar@arnoldporter.com>; Hussain, Murad S. <Murad.Hussain@arnoldporter.com>
Cc: Campbell, Yolonda Y (CIV) <Yolonda.Y.Campbell@usdoj.gov>
Subject: Follow up re: CMS response to Touhy request

External E-mail

Good afternoon. As a follow-up to my earlier email with CMS's response to your 5/26 letter, I wanted to reach out to see whether we could schedule a time in the next few days to discuss your document requests further and work toward finding a compromise with respect to both scope and timing.

Both Yolonda and I would be available for a call either tomorrow (Thursday) between 10am and 4pm ET, or Friday between 9am and 3pm ET. Please let me know if there's a time in those windows that would work for you.

Thanks,

Dawn Popp (she/her)
Office of the General Counsel, CMS Division
U.S. Department of Health and Human Services
(240) 551-9392 (teleworking contact)
Dawn.Popp@hhs.gov

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